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No. 880

In the Supreme Court of the United States

OCTOBER TERM, 1962

SLOAN'S MOVING & STORAGE CO., INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTER DISTRICT OF MISSOURI, EASTERN DIVISION

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.[1]

STATEMENT

This is a direct appeal from a final judgment, entered on September 11, 1962, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325 dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's order granted the applica-

[1] The opinion of the district court is reported at 208 F. Supp. 567.

tion of United Parcel Service, Inc. (UPS), for a certificate of public convenience and necessity pursuant to Section 207(a) of the Interstate Commerce Act, 49 U.S.C. 307(a), authorizing common carriage of small packages by motor vehicle over irregular routes in Illinois, Indiana and Ohio, portions of Michigan, Missouri and Wisconsin, and to specified cities in Iowa (J.S. 22).

The Commission's order (J.S. 35–36) affirmed and adopted the report recommended by the hearing examiner.[2] The examiner's report was based on a lengthy administrative hearing at which 193 public witnesses appeared in support of the application by UPS. Appellant participated throughout these proceedings and opposed the grant of authority to UPS on the ground that additional parcel delivery service was not required in the areas served by appellant. At no time, however, either before the examiner or the Commission, did appellant argue that the control exercised over UPS by its parent, United Parcel Service of America, violated Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)).[3]

This contention was raised for the first time before the three-judge district court, which found that "the unlawful control issue was not properly raised before the Commission" (J.S. 32) and refused "to consider such issue except to the limited extent of determining Sloan's contention that the Commission lacked juris-

[2] For the convenience of the Court, a copy of the examiner's report, 89 M.C.C. 709, is attached to this motion.

[3] Section 5(2) requires Commission approval before any carrier or parent of a carrier acquires control of another carrier.

diction to grant the certificate" (*ibid.*). The court below rejected appellant's contention that compliance with Section 5 is a prerequisite to the granting of a certificate under Section 207 and unanimously affirmed the Commission's order (J.S. 34).

ARGUMENT

This appeal presents no substantial question warranting plenary review by this Court. The determination of whether a certificate of public convenience and necessity should issue is a matter peculiarly for the Commission. *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 535–536; *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65. Since, as the district court found, "there was a factual and legal basis for the Commission's order" (J.S. 34), the order must stand.

1. Appellant contends that the district court erred in holding that a certificate of public convenience and necessity may be granted, "notwithstanding that adequate service is available and existing facilities will be adversely affected" (J.S. 8). Appellant concedes however, that it is not arguing that "adequacy of existing service is an absolute bar to a grant of new authority" or that it has "a vested right to be immunized against competition" (J.S. 10). Thus, the only question presented here is whether the Commission made a permissible evaluation of the existing service and the possible harm to existing facilities, as measured against the need for the proposed service, in determining whether the latter was required by the public convenience and necessity.

In his report, the examiner made a careful and extremely elaborate analysis of appellant's operations (89 M.C.C. 730–731), concluding that appellant "cannot provide the complete service which is proposed by [UPS] and shown to be needed" (*id.*, 741). The examiner also considered the effect of the new service upon appellant and found that "only a very small part" of appellant's traffic would be exposed to diversion, and that such exposure was in respect to a type of traffic "as to which Sloan's has demonstrated an ability to withstand applicant's competition in intrastate commerce * * *" (*ibid.*).

These findings were reviewed and affirmed by the Commission (J.S. 36) and by the court below (J.S. 26–27) which held that the "findings made by the examiner and adopted by the Commission are supported by substantial evidence * * *" (J.S. 28). The validity of the Commission's order which appellant attacks here was also upheld in *Railway Express Agency, Inc.* v. *United States*, 205 F. Supp. 831 (S.D. N.Y.). That decision, as the court below noted, "substantially supports the Commission's determination on the public convenience and necessity issue" (J.S. 28).

Finally, even assuming *arguendo* that the appellant is capable of providing the service required by shippers, this factor standing alone would not bar the Commission from certifying additional service. *Norfolk Southern Bus Corp.* v. *United States*, 96 F. Supp. 756, 760 (E.D. Va.), affirmed *per curiam*, 340 U.S. 802. Appellant has no "vested right to be immunized against competition." *Lang Transp. Corp.* v. *United*

States, 75 F. Supp. 915, 930–931 (S.D. Calif.); *C. E. Hall & Sons, Inc.* v. *United States*, 88 F. Supp. 596, 601 (D. Mass.), even where it may be shown that the resulting competition adversely affects its revenues. *American Trucking Assn.* v. *United States*, 344 U.S. 298, 322 (1953). The determination whether the public convenience and necessity require additional service in such case falls within the Commission's "wide range of discretionary authority". *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241.

2. There is no merit to appellant's contention that because of the alleged violation of Section 5 by UPS, "the Commission lacked jurisdiction to grant the Certificate" (J.S. 19). This argument was expressly rejected in *Yale Transp. Corp.* v. *United States*, 185 F. Supp. 96 (S.D.N.Y.), affirmed *per curiam*, 365 U.S. 566, in which the three-judge court stated (p. 106):

> However, the Supreme Court has said in *Alleghany Corp.* v. *Breswick & Co.*, 1957, 353 U.S. 151, 171, 77 S.Ct. 763, that although the Commission may require the ultimate parent to be joined as an applicant, such joinder is not jurisdictional and lack of it does not make the Commission's grant of approval unlawful.

See, also, *Southern Kansas Greyhound Lines, Inc.* v. *United States*, 134 F. Supp. 502 (W.D. Mo., 1955).

Since the issue is not a jurisdictional one, the court below properly held that appellant was barred by its failure to raise it before the Commission. *United States* v. *L. A. Tucker Lines, Inc.*, 344 U.S. 33.[4]

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[4] In the *Yale Transp.* case, *supra*, the court expressly held that the corporate structure of UPS did not violate Section 5.

3. Appellant quotes a sentence from the examiner's report to support its contention that the Commission "imposed upon Sloan's the burden of proof that the public convenience and necessity did not require the proposed service" (J.S. 9). This claim was considered and rejected by the court below, which stated (J.S. 29): "When this sentence is read in context and in the light of the report as a whole, it is perfectly clear that the burden of proof is not placed upon Sloan."

CONCLUSION

For the foregoing reasons, we respectfully submit that the appeal presents no substantial issue warranting further review and that the judgment of the district court should be affirmed.

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